

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTRYWIDE FINANCIAL)	No. 15-72700
CORPORATION, et al.,)	
Petitioners,)	NLRB No. 31-CA-072916
v.)	NLRB No. 31-CA-072918
NATIONAL LABOR RELATIONS)	
BOARD,)	
Respondent.)	
_____)	
)	
NATIONAL LABOR RELATIONS)	No. 15-73222
BOARD,)	
Petitioner,)	NLRB No. 31-CA-072916
v.)	NLRB No. 31-CA-072918
COUNTRYWIDE FINANCIAL)	
CORPORATION, et al.,)	
Respondents.)	
_____)	

**ON PETITION FOR REVIEW FROM THE DECISION OF
THE NATIONAL LABOR RELATIONS BOARD,
BOARD CASE NOS. 31-CA-072916 AND 31-CA-072918**

**BRIEF FOR PETITIONERS and CROSS-RESPONDENTS
COUNTRYWIDE FINANCIAL CORPORATION;
COUNTRYWIDE HOME LOANS, INC.; and
BANK OF AMERICA CORPORATION**

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CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

Nos. 15-72700 and 15-73222

Countrywide Financial Corporation; Countrywide Home Loans, Inc.; and Bank of America Corporation v. National Labor Relations Board

Pursuant to Federal Rule of Appellate Procedure, Rule 26-1, Petitioners and Cross-Respondents Countrywide Home Loans, Inc., Countrywide Financial Corporation, and Bank of America Corporation (collectively, “Petitioners”) hereby certify that they have no parent company and there is no publicly held corporation that owns 10% or more of its or their stock.

Dated: April 14, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ Gregg A. Fisch*

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BANK OF AMERICA CORPORATION

STATEMENT REGARDING ORAL ARGUMENT

Petitioners and Cross-Respondents Countrywide Financial Corporation, Countrywide Home Loans, Inc. and Bank of America Corporation respectfully request oral argument. This case affects the ability of every employer and employee in the United States covered by the National Labor Relations Act to have their arbitration agreements enforced according to their terms pursuant to the Federal Arbitration Act and United States Supreme Court precedent. Oral argument will allow the parties to address these issues more thoroughly.

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JURISDICTIONAL STATEMENT

Pursuant to Federal Rule of Appellate Procedure (“FRAP”) 28(a)(4) and Circuit Rule 28(a)(4)), Petitioners and Cross-Respondents Countrywide Financial Corporation (“CFC”), Countrywide Home Loans, Inc. (“CHL”), and Bank of America Corporation (“BAC”) (collectively, “Petitioners” or the “Companies”) submit that this Court has jurisdiction over this matter.

First, Respondent National Labor Relations Board (“NLRB” or the “Board”) had jurisdiction over the underlying dispute that is the subject of this Petition pursuant to 29 U.S.C. §§ 160(a)-(c). Section 160(a) states that the Board “is empowered to prevent any person from engaging in any unfair labor practice . . . affecting commerce.” Sections 160(b) and (c) give the Board the authority to issue complaints, conduct hearings, and issue orders with regard to a charge that any person is engaging in an unfair labor practice. The issue before the Board in this case was the allegation that an employer engaged in unfair labor practices within the meaning of Sections 8(a)(1) and 8(a)(4) of the National Labor Relations Act (“NLRA” or “the Act”) and these unfair labor practices are practices affecting commerce within the meaning of the Act, as set forth in 29 U.S.C. § 158.

This Court has jurisdiction over this matter under Section 10(f) of the NLRA, 29 U.S.C. § 160(f), which states that any person aggrieved by a final order of the NLRB may obtain a review of such order in any United States court of

appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business.

Petitioners are aggrieved by the Board's Order because they are the entities against whom the Order was entered.

This Petition is timely. The NLRB issued its Order on August 14, 2015. FRAP 15(a)(1) states that "[r]eview of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order." Neither Rule 15(a)(1) nor 29 U.S.C. § 160, which sets forth the procedure for judicial review of the Board's orders, sets a deadline for the filing of a petition for review. Recognizing this lack of a set deadline, courts have held that "[t]he party challenging the timeliness of a petition must show that more time has elapsed than reasonably necessary and that it was prejudiced by the delay." *Griffith Co. v. NLRB*, 545 F.2d 1194, 1197 n.3 (9th Cir. 1976). In this case, Petitioners filed the Petition for Review on August 28, 2015, just fourteen days after the Board issued the Order and as soon as reasonably practicable. No prejudice could have resulted from the short time between issuance of the Order and the filing of the Petition. The Petition is timely.

Last, the Petition for Review seeks the Court's review of a final order of the Board that disposes of all of the parties' claims. The Board issued a final Order

holding that Petitioners violated the NLRA. Petitioners challenge this conclusion, and this Court's review will dispose of all related claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Pursuant to FRAP 28(a)(5), Petitioners submit that the following issues are before the Court for review:

1. Is the NLRB panel's decision contrary to the Federal Arbitration Act ("FAA") and precedent from the United States Supreme Court interpreting same?
2. Was Petitioners' motion to compel individual arbitration constitutionally protected conduct under the First Amendment?
4. Does the NLRA grant "employees" a substantive right to invoke class action, collective action, and joinder procedures (collectively, "class procedures")?
4. Is there substantial evidence that Petitioners violated the NLRA?
5. If the Court agrees with the Board panel majority that a violation was committed, is it appropriate for penalties to be imposed on BAC or CFC as a proper party to this action, considering it is undisputed that neither entity ever was "an employer" of the Claimants?

STATEMENT OF THE CASE

Petitioners petition this Court to review the Board's decision and order, dated August 14, 2015, finding: (1) an arbitration agreement that is silent as to class actions, and does not contain any express waiver of an employee's right to

bring class or collective actions, violated Section 8(a)(1) of the NLRA; and (2) that Petitioners' actions in seeking to enforce the terms of the arbitration agreements by seeking in federal court to compel Claimants to arbitrate their claims also violated the NLRA.

This proceeding arises from unfair labor practice (ULP) charges filed by two attorneys (the "Charging Parties") who each represented one of the two former CHL employees, Dominique Whitaker ("Whitaker") and John White ("White") (Whitaker and White, collectively, referenced herein as "Claimants"), who brought a wage-and-hour lawsuit against the Companies. Specifically, on January 19, 2012, attorney Paul Cullen filed a charge with the NLRB, alleging that Petitioners violated Section 8(a)(1) of the Act by improperly restricting Claimants from pursuing a class or collective action lawsuit, and thereby interfering with their right to "engage in . . . concerted activities for the purposes of . . . mutual aid or protection." On that same day, attorney Joshua D. Buck filed an identical charge against the Companies. The Board consolidated the two charges and, on October 23, 2012, the Regional Director issued a Consolidated Complaint and Notice of Hearing.

The unfair labor practice charges moved forward. On December 10, 2012, the parties participated in a hearing before Administrative Law Judge William G. Kocol (the "ALJ"). On February 13, 2013, the ALJ issued a recommended Order,

finding no merit to virtually all of Claimants' allegations, thereby recommending that all but one of the unfair labor practice charges set forth in the Consolidated Complaint should be dismissed. The ALJ expressly dismissed BAC and CFC from the matter, based on the fact that neither entity actually was the employer of Claimants and, thus, could not be held liable for actions of the separate employer company, CHL. Analyzing the "silent" arbitration agreement at issue, the ALJ held that the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), does not apply to this matter, since the Arbitration Agreements do not expressly preclude employees from pursuing their claims on a class-wide basis. As such, the ALJ found that the Arbitration Agreements did not violate Section 8(a)(1) of the NLRA. In addition, the ALJ also found that, pursuant to the United States Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the mere filing of a motion to compel individual arbitration in court cannot be considered an unfair labor practice because it is considered protected First Amendment activity (under the Right to Petition). Nevertheless, the ALJ found the Arbitration Agreements violated the Act in one way, concluding that "The arbitration agreement, as reasonably read by employees, prohibits employees from filing charges with the Board, an activity protected by Section 7 and Section 8(a)(4)."

The parties timely filed exceptions to the ALJ's decision. Then, more than two years later, on August 14, 2015, after conducting its automatic review of the ALJ's decision, a three-member panel of the Board entered its decision and order. The two-member majority adopted the ALJ's findings as to the one violation and reversed all of his dismissals accordingly. The Companies timely petitioned this Circuit for review of the Board panel's decision.

Petitioners are aggrieved by the Board panel's order, which is not supported by substantial evidence and is contrary to law. Citing *D.R. Horton*, the Board panel majority held, among other things, that the Companies, individually and collectively, committed an unfair labor practice because they (1) maintained an unlawful arbitration agreement and (2) filed a motion to compel individual arbitration in an underlying class action pending in federal court. The Board panel's order is contrary to the United States Supreme Court controlling precedent. *See Stolt-Nielsen S.A. v. Animal Feeds Intl' Corp.*, 559 U.S. 662 (2010) (holding that, when an agreement is silent on the issue of class-wide arbitration, the parties must proceed with arbitration on an individualized basis); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (holding that arbitration agreements must be enforced according to their terms pursuant to the Federal Arbitration Act); *American Express v. Italian Colors Rest.*, ___ U.S. ___, 133 S. Ct. 2304 (2013) (reiterating that "courts must rigorously enforce arbitration agreements according

to their terms”). And, this Court in an earlier decision, “[w]ithout deciding the issue,” already has noted how courts throughout the country have rejected the Board’s *D.R. Horton* rationale. See *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (noting that “the two courts of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB’s decision in *D.R. Horton* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act (‘FAA’)”).

I. STATEMENT OF FACTS

A. The Parties.

The only relationship between the adverse parties is that Claimants formerly (years ago) were employed by CHL. The Charging Parties never worked for any of the three Companies and otherwise have no relationship to Petitioners, except that they are attorneys who brought lawsuits against the Companies on behalf of Claimants. Claimants currently are not employees of any of the three Companies and have not been employed by any of the entities for more than six years now, and well before any of the underlying charges were filed with the Board.

CHL is the only Petitioner that ever employed either Claimant (or the putative class members in the underlying lawsuit). Whitaker began working for

CHL as a Customer Service Telephone Representative on November 19, 2007.¹ She was granted a leave of absence on May 5, 2008, and then never returned to work, ending her six months of employment many years ago.² White worked for CHL as an Account Manager for about one year, from November 20, 2008, through November 4, 2009.³ Neither Claimant ever worked for CFC or BAC.⁴ But, in the underlying lawsuit, based on a purported (and unfounded) successor liability claim, Claimants nevertheless asserted claims against BAC.

At the time that Claimants were solely employed by CHL, CFC was a holding company, incorporated under the laws of the State of Delaware, that had its corporate headquarters in Calabasas, California.⁵ CFC did not employ any non-exempt employees in California and never employed either Claimant.⁶ CHL also was a separate company and was a wholly-owned subsidiary of CFC.⁷

BAC always has been a separate company from CFC and CHL, and is incorporated under the laws of the State of Delaware, with its corporate headquarters in Charlotte, North Carolina.⁸ The entity previously named

¹ Excerpts of Record (“ER”) 0057, ¶ 5(c).

² *Id.*

³ ER 0057, ¶ 6(c).

⁴ ER 0057, ¶¶ 5-6.

⁵ ER 0055, ¶ 4(b).

⁶ *Id.*

⁷ *Id.*

⁸ ER 0055, ¶ 4(c).

“Countrywide Financial Corporation” that was in existence when Claimants were employed by CHL, has merged out of existence through a complex and involved transaction.⁹ As a result of that transaction, BAC became the ultimate parent company of the merged former CFC’s subsidiaries, including CHL.¹⁰ Further, unlike CHL’s former practice of entering into voluntary arbitration agreements with many of its employees, BAC does not require its employees to enter into arbitration agreements requiring binding arbitration of their employment-related disputes with BAC (or any of its subsidiaries).¹¹

B. Claimants Each Voluntarily Executed An Arbitration Agreement That Does Not Expressly Waive Their Rights to Bring Class or Collective Actions and Did Not Prevent Them From Filing Charges With the NLRB, as this Action Demonstrates.

Claimants each voluntarily accepted and agreed to Countrywide’s Mutual Agreement to Arbitrate Claims (the “Arbitration Agreements”) during his/her respective employment with CHL. Whitaker electronically accepted the Arbitration Agreement on August 30, 2007.¹² White entered into the Arbitration Agreement on September 26, 2008.¹³ The Arbitration Agreements expressly provide, in pertinent part, for:

⁹ ER 0055, ¶ 4(a).

¹⁰ *Id.*

¹¹ ER 0676, ¶ 7.

¹² ER 0057, ¶ 5(b), 0063-0064.

¹³ ER 0057, ¶ 6(b), 0065-0066.

[T]he resolution by arbitration of all claims or controversies arising out of, relating to or associated with the Employee's employment with the Company [CHL] that the Employee may have against the Company or that the Company may have against the Employee, including any claims or controversies relating to the Employee's application for employment with the Company, the Company's actual or potential hiring of the Employee, the employment relationship itself, or its termination (hereinafter the "Covered Claims"). The Covered Claims subject to this Agreement include, but are not limited to, claims for . . . violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy. The purpose and effect of this Agreement is to *substitute arbitration, instead of a federal or state court*, as the exclusive forum for the resolution of Covered Claims. The parties' responsibilities and legal remedies available under any substantive law applicable to a Covered Claim shall be enforced in any arbitration conducted pursuant to this Agreement.

(Emphasis added.)¹⁴

The Arbitration Agreements do not contain in any way a provision that expressly prohibits Claimants' right to assert claims on behalf of other employees on a class-wide or collective basis. Rather, the Arbitration Agreements are completely silent on the issue of class arbitration. The Arbitration Agreements further provide that:

EACH PARTY TO THIS AGREEMENT
ACKNOWLEDGES CAREFULLY READING THIS
AGREEMENT, UNDERSTANDING ITS TERMS,
AND *ENTERING INTO THIS AGREEMENT*

¹⁴ ER 0057, ¶ 5(b) and ¶ 6(b), 0063-0066.

VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF.

EACH PARTY FURTHER ACKNOWLEDGES HAVING THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH PERSONAL LEGAL COUNSEL AND HAS USED THAT OPPORTUNITY TO THE EXTENT DESIRED.

(Emphasis added.)¹⁵

C. The Underlying Lawsuit.

On June 16, 2009, Claimant Whitaker initiated a lawsuit against Petitioners in Ventura County Superior Court, Case No. 56-2009-00347462-CU-OE-VTA (hereafter referenced as “*Whitaker*”).¹⁶ Petitioners timely removed that case to federal district court, Case No. VC 09-5898 CAS (PJWx).¹⁷ While *Whitaker* was pending, on March 16, 2011, Whitaker and BAC filed a joint stipulation in the multi-district litigation entitled *In re: Bank of America Wage and Hour Employment Practices Litigation*, United States District Court for the District of Kansas, Case No. 10-MD-2138-JWL-KGS, in which Claimants confirmed that the putative class in *Whitaker* “will be limited to current and/or former employees of Countrywide and will specifically exclude any current and/or former employees of BOA [that entity herein referenced as “BAC”], and hereby stipulate to the entry of

¹⁵ ER 0057, ¶ 5(b) and ¶ 6(b), 0063-0066.

¹⁶ ER 0058, ¶ 8, 0067-0098.

¹⁷ ER 0058, ¶ 9, 0099-0162.

an Order by the *Whitaker* court so confirming that limited scope of any putative class or subclass.”¹⁸

A few months later, on June 27, 2011, Claimants filed a Third Amended Complaint (“TAC”) in *Whitaker*, in which they generally alleged that Countrywide (and only Countrywide and not BAC) required its California call center employees to work off-the-clock when booting up their computers and connecting to Countrywide’s telephone system at the beginning of the day and when shutting down their computers and logging off the telephone system at the end of the day.¹⁹ In the TAC, Claimants make clear that they are not bringing their claims against BAC as an employer, and only as a purported “successor in liability,” expressly stating that they “allege that Defendant BofA’s involvement in this matter is limited to its role as a successor in liability to the liabilities of the Countrywide entities.”²⁰

The TAC alleged seven causes of action for: (1) failure to pay overtime in violation of California Labor Code sections 510 and 1194 and IWC Wage Order No. 4-2001; (2) waiting time penalties under Labor Code section 203; (3) failure to provide an accurate itemized wage statement in violation of California Labor Code section 226; (4) failure to pay minimum wage in violation of California Labor

¹⁸ ER 0058, ¶ 10, 0163-0182.

¹⁹ ER 0058, ¶ 12(a)-(b), 0183-0216.

²⁰ *Id.*

Code section 1194 and IWC Wage Order No. 4-2001; (5) failure to pay minimum and overtime wages in violation of the Fair Labor Standards Act (FLSA); (6) unfair competition pursuant to Business & Professions Code sections 17200, *et seq.*; and (7) failure to provide meal periods and rest breaks.²¹ Claimants sought to bring these claims on behalf of a putative class of Countrywide employees, pursuant to Federal Rules of Civil Procedure, Rule 23, and also on a collective basis, based on federal law, under 28 U.S.C. § 216.²²

D. Although the District Court Granted Petitioners’ Motion to Compel Arbitration, The Court Did Not Decide and Left for The Arbitrator to Decide the Issue of Whether Class or Collective Arbitration is Allowed Under the Arbitration Agreements.

Petitioners timely filed a motion to compel both Whitaker and White to arbitrate their claims pursuant to the Arbitration Agreements.²³ The District Court, Honorable Christine A. Snyder presiding, granted Petitioners’ motion to compel arbitration and stayed the litigation on September 19, 2011.²⁴ However, in its Order, the Court specifically found that the “question of whether plaintiffs are subject to individual or class arbitration depends on the parties’ intent and *is a question for the arbitrator to decide.*”²⁵ (Emphasis added.) Accordingly, the

²¹ *Id.*

²² *Id.*

²³ ER 0058-0059, ¶¶ 13(a) and 14(a), 0217-0652.

²⁴ ER 0059, ¶ 16, 0653-0670.

²⁵ *Id.*

District Court did not decide whether Claimants could assert their claims on a class-wide basis in arbitration or if the Arbitration Agreements permit class or collective arbitration.

Thereafter, on September 30, 2012, the Charging Parties filed a demand for arbitration on behalf of both Claimants *collectively*.²⁶ However, there never was a determination by the arbitrator (or any other authority) as to whether Claimants could assert their employment-related claims on a class-wide or collective basis in arbitration.²⁷ In fact, at the time the ALJ held the hearing and the parties submitted their Joint Stipulation, the parties had yet to even select an arbitrator or otherwise brief the issue as part of the arbitration process.²⁸

E. Ultimately, The Parties Reached a Class-Wide Settlement in the Underlying Lawsuit and A Final Order and Award Granting Final Approval of Class Action Settlement was Entered by Both the Arbitrator and Federal District Court Judge.

After mediating the underlying lawsuit, Claimants and Petitioners reached a class-wide settlement of the claims asserted by Claimants. First, on October 20, 2014, the Arbitrator entered a Final Order and Award Granting Final Approval of the Class Action Settlement. Then, on October 29, 2014, the District Court confirmed the Arbitrator's Final Order and Award and entered judgment

²⁶ ER 0060, ¶ 20, 0671-0673.

²⁷ ER 0060, ¶ 21.

²⁸ ER 0060, ¶ 20.

accordingly.²⁹ As a result, the underlying lawsuit reached its conclusion through an approved class action settlement and Claimants ultimately settled the matter on a class-wide basis.

F. The ALJ Ruled that Virtually All of the Allegations in the Consolidated Complaint Should Be Dismissed in Their Entirety.

Meanwhile, on February 13, 2013, the ALJ issued his decision and recommended Order. In that Order, the ALJ first found that CHL is the only proper party to the proceeding since it was the only entity that ever employed Claimants.³⁰ Thus, the ALJ dismissed CFC and BAC. Second, the ALJ ruled that the statute of limitations barred Claimants' allegations that they were "forced to sign" the Arbitration Agreements as "a condition of employment" with CHL in 2007 and 2008, respectively, which "impermissibly and unlawfully restricted" their rights under Section 7 of the NLRA.³¹ Further, the ALJ found that the Companies did not commit an unfair labor practice by enforcing the Arbitration Agreements as written and seeking to compel Claimants to arbitrate their claims on an individual basis.³² The ALJ expressly held that the NLRB's decision in *D.R. Horton* does not

²⁹ See Request for Judicial Notice, Exs. A and B. On December 1, 2014, the Regional Director of NLRB Region 31 denied the Charging Parties' request to dismiss the Consolidated Complaint as part of the class-wide settlement of the underlying lawsuit. See Request for Judicial Notice, Ex. C.

³⁰ ER 0047:39-0048:7.

³¹ ER 0050 n 4.

³² ER 0048:35-0050:4.

apply because, unlike the situation in *D.R. Horton*, the Arbitration Agreements do ***not expressly waive*** Claimants' right to assert any employment-related claims on a class-wide or collective basis in court or arbitration. In addition, the ALJ found that Petitioners' actions in filing the motion to compel arbitration in federal court – which finds support from binding United States Supreme Court precedent – could not be a predicate act for an unfair labor practice because it was constitutionally protected First Amendment activity, also consistent with and supported by Supreme Court precedent.³³

G. The Board Panel Overruled the ALJ and Held that All Three Companies Should be Found to Have Violated the NLRA, Relying on the NLRB's Decision in *D.R. Horton* that Has Been Rejected by Circuit Courts Nationwide, Including by the Ninth Circuit.

On August 14, 2015, a divided three-member panel of the Board issued its Decision and Order, adopting the ALJ's findings as to the one violation and reversing all of his dismissals. Two of the three members of the Board panel found that, notwithstanding the facial validity of Countrywide's arbitration agreement, which is silent as to class actions and does not contain any express waiver of an employee's right to bring class or collective actions, all three of the Companies

³³ ER 0050:6-24.

nonetheless violated Section 8(a)(1) of the NLRA.³⁴ The panel majority found Petitioners' actions in seeking to enforce the terms of the Arbitration Agreements by moving in federal court to compel Claimants to arbitrate their claims also violated the NLRA. The Dissenting member of the panel agreed with Petitioners, explaining that the Board ruled in contravention of Supreme Court precedent.

The Companies timely petitioned this Circuit for review of the Board panel's decision and Order.

II. SUMMARY OF THE ARGUMENT

The Board panel majority's rulings – that the Companies violated the NLRA and committed unfair labor practices when they sought to enforce Claimants' Arbitration Agreements and moved a federal court to compel arbitration of their employment-related claims – are in error and should not be enforced. The panel majority wrongly concluded that Petitioners improperly restricted Claimants (former CHL employees) from pursuing a class or collective action lawsuit, thereby interfering with their right to “engage in . . . concerted activities for the purposes of . . . mutual aid or protection” in violation of Section 8(a)(1) of the NLRA. Based on the undisputed stipulated facts and governing law, there is

³⁴ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7. 29 U.S.C. § 158(a)(1).

no proper basis for the Board panel majority's findings and the Court should deny enforcement of the Order in its entirety.

First, Petitioners did not maintain an unlawful arbitration agreement for a basic reason. The Arbitration Agreements maintained by CHL did not prohibit employees from filing unfair labor practice charges with the NLRB and employees would not reasonably read the Arbitration Agreements to prohibit such filings with the NLRB. Contrary to the Board panel majority's findings, there is no proper basis to conclude that employees would reasonably construe the Arbitration Agreements to prevent them from accessing the NLRB. In fact, Claimants themselves did not believe they were precluded from filing claims with the NLRB, considering that they actually filed unfair labor practice charges with the NLRB related to the Arbitration Agreements. Consequently, there is no proper basis for a finding that Petitioners' maintenance of the Arbitration Agreements violated Section 8(a)(1) here.

Second, the Arbitration Agreements do not expressly prohibit the exercise of Claimants' substantive rights protected by the NLRA (whether through entering into the voluntarily agreed-upon Arbitration Agreements or otherwise). The arbitration agreements at issue in *D.R. Horton* and *Murphy Oil* (which NLRB decisions are the only ostensible legal support for the Board panel majority's conclusions that Petitioners committed unfair labor practices here) are materially

different from the Arbitration Agreements here. In those NLRB matters, the arbitration agreements *expressly* provided that the arbitrator “may hear only Employee’s individual claims” and “does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding”; whereas, the Arbitration Agreements here do not expressly waive Claimants’ right to assert any employment-related claims on a class-wide or collective basis in court or arbitration. Rather, the Arbitration Agreements are completely silent on the issue of whether any class or collective action claims can be asserted by the former employees and there never was any determination by a court, a judge, an arbitrator, or any other authority as to whether or not Claimants actually could assert their employment-related claims on a class-wide or collective basis in arbitration. In addition, the Arbitration Agreements require only that Claimants arbitrate the types of claims that lawfully can be mandated to arbitration. Thus, under controlling United States Supreme Court precedent, the Arbitration Agreements must be interpreted and enforced only as written and cannot be the basis for a finding of an unfair labor practice.

The NLRA protects the rights of employees to engage in “concerted activity,” which is when two or more employees take action for their purported mutual aid or protection. Here, employees actually engaged in concerted activity when the Charging Parties filed a civil complaint in court and then a demand for

arbitration on behalf of both Claimants *collectively*. Thereafter, they mediated the claims and reached a class action settlement that was finally approved by the arbitrator and a federal court. Thus, Claimants' Section 7 rights under the NLRA to "engage in . . . concerted activities for the purposes of . . . mutual aid or protection" have not been violated. They in fact were able to join together to assert claims, collectively, in their lawsuit and, ultimately, to settle the claims on a class-wide basis.

In addition, Petitioners' alleged unlawful act involves constitutionally protected conduct. The Board panel majority's baseless finding that Petitioners committed an unfair labor practice merely by filing a motion to compel arbitration in federal court should be rejected for this separate and independent reason. Petitioners filed their federal court motion, relying on the executed Arbitration Agreements, the FAA, and binding United States Supreme Court precedent. As the Supreme Court made clear in *Bill Johnson's Restaurants*, 461 U.S. 731, and its progeny, Petitioners' court filing is protected activity under the First Amendment. Thus, the Board panel majority's rulings should be rejected outright and the Court should refuse to enforce the Order in its entirety.

Lastly, even if the Court were to agree with the majority of the Board panel and find that unfair labor practices were committed, it should impose no penalties on BAC or CFC. CFC and BAC are not (and never have been) proper parties to

these proceedings and should have been dismissed long ago. Claimants baselessly asserted claims against BAC solely on a successor entity theory of liability. Yet, the controlling Supreme Court decision of *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973), as well as the facts giving rise to this proceeding and prior court rulings on the specific subject, demonstrate that BAC cannot be held liable as a successor entity for alleged unfair labor practices purportedly committed by CHL (or CFC). Moreover, it is undisputed that CHL (and *not* CFC) is the only one of the Companies that ever employed Claimants (or any of the putative class members) and, therefore, it is the only entity that even possibly could be a proper party to this proceeding.

III. **ARGUMENT**

A. Standard of Review

1. Legal Standards

The Court is authorized to set aside in whole or in part the Board's findings and Order. 29 C.F.R. § 101.14. The Court should uphold on appeal decisions of the NLRB only if its findings of fact are supported by substantial evidence and if the Board correctly applied the law. *See Healthcare Employees Union v. NLRB*, 463 F.3d 909, 918 (9th Cir. 2006); *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003); *California Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 307 (9th Cir. 1996). "When the Board's findings lack such support [of 'substantial

evidence’] in the record, the reviewing courts must set them aside, along with the orders of the Board that rest on those findings.” *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 782 (1979).

The Court only needs to defer to the Board’s interpretation of the NLRA if it is rational and consistent with the NLRA. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576 (1994). “Deference to the Board ‘cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.’” *NLRB v. Financial Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) (citation omitted). Therefore, courts do not defer to the Board in determining whether the Board exceeded its authority under the NLRA. *See id*; *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965); *NLRB v. Insurance Agents’ Int’l Union*, 361 U.S. 477, 499-500 (1960).

Additionally, courts do not defer to the Board’s interpretation of law outside the NLRA. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202-03 (1991); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n. 9 (1984); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (“[W]e have . . . never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.”); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (“[T]he Board has not been commissioned to

effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.”).

2. This Court Should Not Defer to the Board Panel in Reviewing Its Decision.

The Court should accord no deference to the Board panel here. First, the fundamental question presented here is whether the panel exceeded its authority under the NLRA and whether the Board panel majority reached a decision that is contrary to the FAA and applicable Supreme Court precedent. That is an issue for this Court to decide in the first instance.

Deference also is inappropriate here because the Board panel majority’s decision does not solely, or even primarily, interpret the NLRA. Although the Board panel majority purported to define a term of the NLRA (the scope of employees’ right to engage in “concerted activities” for “mutual aid or protection” under Section 7), it interpreted Section 7 to grant employees a substantive, non-waivable right to access judicial procedures that are created by, and exist solely by virtue of, laws other than the NLRA, such as the FLSA and the Federal Rules. Additionally, the panel interpreted the FAA and case law applying it, which are not within the Board’s expertise or authority to define. Consequently, the Court is authorized to rule and deny enforcement of the Board Order without providing any deference at all to the Board.

B. Allegations that Claimants were “Forced to Sign” Unlawful Arbitration Agreements are Time Barred by the Applicable Statute of Limitation

The ALJ properly concluded that the applicable statute of limitation barred Claimants’ allegations that they were “impermissibly and unlawfully restricted” in the exercise of their Section 7 rights by being “forced to sign” the Arbitration Agreements as “a condition of employment” with CHL and, therefore, dismissed the unfair labor practice charges accordingly.³⁵ Under the NLRA, an unfair labor practice charge must be filed within six (6) months of the alleged violation of the Act. *See* 29 U.S.C. § 160(b). Claimants’ own allegations make clear that this purported unfair labor practice – an alleged violation of their rights under Section 7 of the NLRA – occurred only once for each of them years ago when CHL supposedly required Claimants, as a condition of their employment, to sign the Arbitration Agreements in 2007 and 2008, respectively. Because Claimants filed their charges in 2012, many years after the alleged unfair labor practices purportedly occurred, they are time barred and cannot serve as a basis for any purported Section 7 violations for this reason alone.

³⁵ Section 7 of the NLRA provides in relevant part that employees shall have the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157. “Mutual aid or protection” includes employees’ efforts to “improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978).

C. Petitioners Did Not Maintain an Unlawful Arbitration Agreement

The Board panel majority incorrectly found that Petitioners maintained an arbitration agreement that “interferes with employees’ right to file charges with the Board” in violation of Section 8(a)(1) of the Act. The Arbitration Agreements maintained by CHL did not prohibit employees from filing unfair labor practice charges with the Board and would not be reasonably read by employees to prohibit such filings with the Board.

When, as here, a company policy does not expressly restrict Section 7 rights, the finding of a violation of the Act is contingent on whether employees would reasonably construe the applicable language to prohibit their right of access to the Board. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Contrary to the Board panel majority’s findings, there is no proper basis to conclude that employees would reasonably construe the Arbitration Agreements to prevent them from accessing the Board. In fact, there is no showing that even one individual ever was precluded from accessing the Board or otherwise did not submit an administrative charge because of the existence of the Arbitration Agreements. It is clear that Claimants themselves did not believe that they were precluded from filing claims with the Board, considering that they (through their representatives) actually filed unfair labor practice charges with the Board related

to the Arbitration Agreements. The Arbitration Agreements do not violate the Act in this way either.

When considering the terms in their totality, the Arbitration Agreements facially apply only to litigation matters that potentially could be filed in a court of law and do not apply to any claims filed with administrative agencies such as the NLRB. For instance, the Agreements discuss how the governing law applied by the U.S. District Court sitting at the place of the hearing should apply to the disputes. The Agreements also set forth various procedures, such as discovery and motion practices, that are inherently inconsistent with proceedings conducted by the Board. Further, the Agreements expressly establish that their specific purpose is to avoid litigating any civil claims in “court.” They do not address claims that are raised with any administrative agency or in any such forum, and specifically state that “The purpose and effect of this Agreement is to *substitute arbitration, instead of a federal or state court . . .*” (Emphasis added.) Lastly, the Arbitration Agreements specify that, “In addition, if either the Company or the Employee has more than one claim against the other, one or more of which is not covered by this Agreement, such claims shall be *determined separately in the appropriate forum* for resolution of those claims.” (Emphasis added.)

Such explicit language makes clear that the Arbitration Agreements do not require Claimants to arbitrate any administrative claims arising out of their

employment with CHL. Those claims that are not brought in court and, instead, are raised in another forum, such as the claims in the NLRB matters, do not implicate the Arbitration Agreements and do not trigger the terms thereunder. Indeed, Claimants filed the unfair labor practice charges with the NLRB (and Petitioners do not contend that they automatically were procedurally precluded from doing so), which demonstrates that the Arbitration Agreements do not restrict Claimants' ability to seek relief from the NLRB.³⁶ These contractual terms do not apply to administrative matters, such as the matters actually raised before the NLRB.

The ruling in a case cited by the ALJ in his recommended Order is instructive of the limitations for when an arbitration agreement would be found to preclude employees from filing charges with the Board and why there is no such

³⁶ Nonetheless, Claimants have no proper basis to assert their charges now. As former employees, Claimants have no ability to exercise any of those rights here (*i.e.*, to engage in “concerted activities” to improve their working conditions) since they had not been employees for many years and the alleged conduct on which they base their charges occurred well after their employment ended, therefore undercutting any right or ability they might have to improve the working conditions at their former employer. In fact, the Supreme Court previously has made clear that former employees, such as Claimants here, have no standing to seek similar injunctive relief in civil actions. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541, 2559-2560 (2011) (holding that “plaintiffs no longer employed by [defendant] lack standing to seek injunctive or declaratory relief against its employment practices”); *see also Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136, 1142, n. 5 (2011) (“Price does not seek injunctive relief . . . nor could he because he lacks standing as a former Starbucks employee.”).

violation here. In *Supply Technologies, LLC*, 359 NLRB No. 38 (2013), the employer's arbitration agreement mandated that all claims arising out of the employment relationship must be arbitrated. However, the arbitration agreement also expressly excluded three (and only three) specific types of claims from the arbitration process: criminal matters, workers' compensation claims, and unemployment compensation benefits. The arbitration agreement emphasized that those three specified types are the "only claims [employees] can bring outside of the [arbitration] program." *Id.* at *17. With those express limitations in place in that arbitration agreement, the Board found that reasonable employees would understand the applicable terms of the arbitration agreement to mean that they could not file charges with the Board because the limited exceptions to the arbitration agreement did not include claims for violations of the Act to be filed with the Board. *Id.* at *18. That situation is very different from the one presented here.

Unlike the arbitration agreement at issue in *Supply Technologies*, the Arbitration Agreements do not contain limited exceptions that exclude only certain specified claims from arbitration. Rather, as noted above, the Arbitration Agreements indicate that only civil claims which otherwise would be brought in court must be arbitrated. The Agreements further explain that other claims can proceed in different forums. Thus, the limited ruling in *Supply Technologies* does

not apply to the situation presented here. To the contrary, as demonstrated by the Claimants actually filing unfair labor practice charges with the Board, CHL employees would not reasonably conclude that they were precluded from accessing the Board.

Another case cited by the Board panel majority to support its finding is clearly distinguishable. In *U-Haul Company of California*, 347 NLRB 375, 377 (2006), the Board found a mandatory arbitration policy that broadly covered all “legal or equitable claims and causes of action recognized by local, state or federal law or regulations” violated the NLRA. However, no such broad-sweeping language appears in the Arbitration Agreements and, thus, *U-Haul* is inapplicable here. Consequently, there is no proper basis for a finding that Petitioners’ maintenance of the Arbitration Agreements violated Section 8(a)(1).

D. Petitioners Did Not Violate the NLRA by Seeking to Enforce the Terms of the Arbitration Agreements when They Sought in Federal Court to Compel Claimants to Arbitrate their Claims

Consistent with the ALJ’s correct finding (and the Dissent opinion) and contrary to what the Board panel majority held, Petitioners did not violate any of Claimants’ substantive rights protected by the NLRA, when as part of the underlying litigation, they sought in federal court to compel Claimants to arbitrate their claims. This Court should deny enforcement of the Board’s findings in this regard.

1. The Arbitration Agreements Do Not Prohibit the Exercise of Claimants' Substantive Rights Protected by the NLRA

Petitioners did not violate any of Claimants' substantive rights protected by the NLRA. The Board panel majority bases its findings that Petitioners committed unfair labor practices on the decision issued by the two-member Board panel in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and the subsequent reaffirming Board decision of *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). Yet, both of those Board decisions were denied enforcement by the Fifth Circuit (and have been outright rejected by other courts throughout the country).³⁷ In fact, there

³⁷ See, e.g., *Gerton v. Fortiss, LLC*, 2016 WL 613011, at *4 (N.D. Cal. Feb. 16, 2016) (explaining that “the majority of federal courts to have considered [*D.R. Horton*] have rejected its reasoning”) (quoting *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1077-79 (N.D. Cal. 2015)); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297, n.8 (2nd Cir. 2013) (“we decline to follow the decision in *D.R. Horton*”); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054-55 (8th Cir. 2013) (“we reject [plaintiff’s] invitation to follow the NLRB’s rationale in *D.R. Horton*”); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 367-74 (2014) (“We thus conclude . . . that sections 7 and 8 of the NLRA do not represent a ‘contrary congressional command’ overriding the FAA’s mandate.”); see also *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (confirming enforceability of class action waivers in arbitration agreements, explaining that it would not defer to the *D.R. Horton* rationale, and noting that “the two courts of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB’s decision in *D.R. Horton* on the ground that it conflicts with the explicit pronouncements of the (footnote continued)

are no Circuit Court decisions supporting the NLRB's position.³⁸ Moreover, notwithstanding the lack of support for those decisions, *D.R. Horton* and *Murphy Oil* substantively fail to support the conclusions reached by the Board panel majority. Rather, *D.R. Horton* is particularly instructive as to why Petitioners' position (and the Dissent opinion) is correct and the Board panel's Order should not be enforced.

In the *D.R. Horton* decision, two members of the NLRB held narrowly that the employer's **express** class/collective action waiver in its arbitration agreements – which all employees were required to sign as a condition of employment – constituted an unfair labor practice under the NLRA. 2012 WL 36274, at *8. The arbitration agreement at issue there expressly stated that the arbitrator “may hear only Employee's individual claims,” and “does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.” *Id.* at *20. The NLRB held that the

Supreme Court concerning the policies undergirding the Federal Arbitration Act ('FAA')).

³⁸ See *Siy v. CashCall, Inc.*, 2014 WL 37879, at *13 (D. Nev. Jan. 6, 2014) (observing that “[a]ll of the courts of appeals that have considered whether the FLSA establishes a congressional intent to bar employees from agreeing to arbitrate FLSA claims individually have concluded that arbitration agreements containing class waivers are enforceable in FLSA cases”); *Morris v. Ernst & Young LLP*, 2013 WL 3460052, at *9 (N.D. Cal. July 9, 2013) (noting that every circuit court that has addressed the issue has held “that arbitration agreements can validly waive collective actions because Congress did not intend to confer a nonwaivable right to a class action under the FLSA”).

employer violated Section 8(a)(1) of the Act because it required its employees to sign an agreement that ***expressly*** barred them from bringing class and collective claims in an arbitral or judicial forum and, therefore, constituted an unlawful restriction on the employees' Section 7 rights to engage in concerted action for mutual aid or protection. *Id.*, at *17 (“We thus hold, for the reasons explained above, that [D.R. Horton] violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial.”).

In reaching its conclusion, the Board in *D.R. Horton* addressed the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, the Supreme Court held that an employer can require an employee, as a condition of employment, to agree to resolve his or her individual employment-related claims in private arbitration. *Gilmer*, 500 U.S. at 31. In distinguishing *Gilmer*, the two-member panel in *D.R. Horton* specifically noted that the “arbitration agreement [in *Gilmer*] contained no language specifically waiving class or collective claims.” *D.R. Horton.*, 2012 WL 36274, at *12.

Here, unlike the situation in *D.R. Horton*, and quite similar to the arbitration agreement in *Gilmer*, the Arbitration Agreements do ***not expressly waive*** Claimants' right to assert any employment-related claims on a class-wide or collective basis in court or arbitration. The Arbitration Agreements are completely

silent on the issue and make no reference as to whether Claimants can proceed on a class-wide or collective basis in arbitration. Because the Arbitration Agreements on their face do not contain an express class or collective action waiver, CHL did not require Claimants, as a condition of their employment, to execute a mandatory arbitration agreement that restricted the exercise of their Section 7 rights.

In addition, the *D.R. Horton* two-member panel explicitly stated that the decision did not apply to circumstances like those presented here. The Board held that its decision did not apply to a situation where employees could pursue their class claims in arbitration. *D.R. Horton*, 2012 WL 36274, at *18 n. 28 (stating that decision did not address question of “whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration”). Here, there never was a determination by a court, a judge, an arbitrator, or any other authority as to whether Claimants actually could have asserted their employment-related claims on a class-wide or collective basis in arbitration. Moreover, the parties ultimately reached a class-wide settlement of the claims, thereby demonstrating that Claimants were in fact permitted to proceed on behalf of a putative class. Claimants have no basis to claim an unfair labor practice in these matters or otherwise assert that they were prevented from

engaging in concerted activities for the purpose of mutual aid or protection. The Board panel majority's conclusions are without factual or legal support.

2. Claimants Actually Pursued Their Claims in Arbitration Collectively and, Therefore, Exercised Their Rights Under the Act to Engage in Concerted Activities

Contrary to the Board panel majority's findings, Petitioners did not violate the NLRA's protection for employees to engage in "concerted activities" for their mutual aid or protection related to terms and conditions of employment. It is black-letter law that "concerted activities" occur when two or more employees take action for their purported mutual aid or protection. *See Meyers Indus.*, 268 NLRB 493, 497 (1984); *see also* NLRB website at <https://www.nlr.gov/rights-we-protect/employee-rights> (stating that "the National Labor Relations Board protects the rights of employees to engage in 'concerted activity,' which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment"); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942) (holding that the filing of a FLSA suit by three employees was considered protected concerted activity).

Here, Claimants initiated the arbitration process by filing their Demand for Arbitration with JAMS *collectively* and, ultimately, the parties reached a class action settlement of the claims on a class-wide basis. Thus, Claimants' substantive right under the NLRA to "engage in . . . concerted activities for the purposes of . . .

mutual aid or protection” has not been violated. Indeed, even after the District Court granted Petitioners’ motion to compel arbitration, Claimants continued to join together in arbitration to collectively pursue their claims against the Companies, finally reaching a settlement on a class-wide basis. Accordingly, there is no basis to find an unfair labor practice in these matters or otherwise conclude that Claimants were prevented from engaging in concerted activities for the purpose of mutual aid or protection.

3. Supreme Court Precedent Provides Controlling Authority for Petitioners to Enforce the Arbitration Agreements that Lawfully Require Arbitration of Employment-Related Claims

Petitioners did not commit an unfair labor practice by enforcing the terms of the “silent” Arbitration Agreements and seeking to compel Claimants to arbitrate their claims. Yet, the Board panel majority nonetheless reached just such a conclusion. Here, Petitioners did not invoke or seek to invoke an “unlawful” arbitration agreement. The Arbitration Agreements are silent as to class and collective actions, do not contain any express prohibitions of employees’ rights, and have no waivers similar to the agreements in *D.R. Horton* (or *Murphy Oil*).

Petitioners did not move to compel arbitration based on an agreement that expressly waived Claimants’ rights to engage in concerted activities. Rather, Petitioners moved to compel arbitration based on the terms of the parties’ lawful agreement to arbitrate certain employment-related claims, similar to what the

Supreme Court permitted in *Gilmer*. In its Order, the District Court granted Petitioners' Motion by relying upon the precedential holdings from the Supreme Court's decisions in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 and *AT&T Mobility v. Concepcion*, 563 U.S. 333. In those landmark decisions, the Supreme Court made clear that arbitration agreements must be enforced according to their terms, holding that, where, like here, such an agreement is silent on the issue of class-wide arbitration, the parties must proceed with arbitration on an individualized basis. *See Concepcion*, 563 U.S. 333 (holding that class-action waivers are enforceable because "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"); *Stolt-Nielsen*, 559 U.S. at 684-87 (holding that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so" and rejecting that "the parties' mere silence on the issue of class action arbitration constitutes consent to resolve their disputes in class proceedings"); *see also CompuCredit v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665, 672 (2012) (reaffirming that the FAA mandates that arbitration agreements be enforced according to their terms); *American Express v. Italian Colors Rest.*, ___ U.S. ___, 133 S. Ct. 2304 (2013) (reiterating that "courts must rigorously enforce arbitration agreements according to their terms").

Multiple federal and California state courts have granted identical motions and ordered plaintiffs to individually arbitrate their claims because they determined, over plaintiffs' objections, that the arbitration agreements did not authorize class arbitration given that the arbitration agreements were silent as to that issue. *See, e.g., Cobarruviaz v. Maplebear, Inc.*, __ F. Supp. 3d __, 2015 WL 6694112, at *10-11 (N.D. Cal. Nov. 3, 2015) (compelling "arbitration on an individual basis only," where arbitration agreement was silent as to class claims); *Martinez v. Leslie's Poolmart, Inc.*, 2014 WL 5604974 (C.D. Cal. Nov. 3, 2014) (finding that defendant "may not be compelled to arbitrate plaintiff's claims on a class-wide basis" where agreement is silent regarding arbitration of class claims); *Lopez v. Ace Cash Express, Inc.*, 2012 WL 1655720 (C.D. Cal. May 4, 2012) (granting defendant's motion to compel individual arbitration of plaintiff's claims because "when an arbitration agreement is silent regarding the availability of class-wide arbitration . . . the parties may be compelled to participate in bilateral arbitration only"); *In Re California Ins. Antitrust Litigation*, 2011 WL 2566449 (N.D. Cal. June 27, 2011) (noting that "courts must compel arbitration even in the absence of the opportunity for plaintiffs to bring their claims as a class action" and compelling individual arbitration of plaintiffs' claims where "the applicable arbitration agreements are silent as to class-action waivers"); *Goodale v. George S. May Intern. Co.*, 2011 WL 1337349 (N.D. Ill. April 5, 2011) ("The Plaintiffs insist

that the agreement's silence mandates that the Court allows the arbitrator to determine the arbitrability of the class claims. Supreme Court precedent, however, squarely forecloses the possibility that the class claims are arbitrable."); *Valle v. Lowe's HIW, Inc.*, 2011 WL 3667441, * 5 (N.D. Cal. Aug. 22, 2011) (granting motion to compel individual arbitration and rejecting as "nonsensical" plaintiffs' argument that waiver of right to proceed on class basis in putative wage-and-hour class action rendered arbitration agreement invalid because it would violate Section 7 right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"); *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1169 (S.D. Cal. 2011) (granting defendant's motion to compel individual arbitration, concluding that Section 7 of the "NLRA does not operate to invalidate or otherwise render unenforceable" arbitration provisions prohibiting class actions); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (2012) (granting defendant's motion to compel individual arbitration because the agreement was either silent on class arbitration or did not allow for class arbitration since it covered only disputes "between myself [the plaintiff there] and [the employer] Legacy Partners").

E. The Motion to Compel Arbitration that Petitioners Filed in Federal District Court is Constitutionally-Protected Conduct Under the First Amendment

The Board panel majority's findings that Petitioners committed an unfair labor practice merely by filing a motion to compel arbitration in federal court should be rejected for another separate and independent reason: Petitioners' alleged unlawful act involves constitutionally-protected conduct. Petitioners filed their federal court motion, relying on the executed Arbitration Agreements, the FAA, and binding United States Supreme Court precedent. As the Supreme Court made clear in *Bill Johnson's Restaurants*, 461 U.S. 731, and its progeny, Petitioners' court filing is protected activity under the First Amendment.

1. Binding Supreme Court Precedent Establishes that Petitioners' Actions in the District Court Cannot Be a Basis for Finding that an Unfair Labor Practice was Committed

The holding in *Bill Johnson's Restaurants* makes clear that Petitioners' actions cannot be the basis of an unfair labor practice. In that case, a restaurant owner had filed a libel lawsuit against individuals who picketed its restaurant after a waitress was fired. *Id.* at 733. The owner alleged that the picketing was harassing and that a leaflet distributed by the picketers was libelous. The waitress then filed a charge with the Board claiming the lawsuit had been filed to retaliate against the engagement of protected activities. The administrative law judge found that the owner's lawsuit constituted an unfair labor practice because it was baseless

and designed to punish protected activity. *Id.* at 736. The NLRB affirmed and ordered the owner to withdraw its lawsuit. The Ninth Circuit Court of Appeal enforced the Board’s order. *Id.* at 737.

The Supreme Court vacated the judgment on Constitutional grounds. Specifically, the Court held that the First Amendment and federalism concerns prevented the “filing and prosecution of a well-founded lawsuit” from being “enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff’s desire to retaliate against the defendant for exercising rights protected by the Act.” *Id.* at 737. In reaching its conclusion, the Supreme Court noted that the First Amendment provides for the fundamental right to petition the Government through access to courts and that the right to petition is one of “the most precious of liberties safeguarded by the Bill of Rights.”³⁹ *Id.* at 741; *see also BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002) (recognizing that the right to petition is one of “the most precious of liberties safeguarded by the Bill of Rights”) (quoting *Mine Workers v. Illinois Bar Ass’n*, 389 U.S. 217, 222 (1967)). As the Board itself has acknowledged, “[t]he right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right.” *Peddie*

³⁹ The First Amendment provides, in relevant part, that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”

Buildings, 203 NLRB 265, 272 (1973), enforcement denied on other grounds, *NLRB v. Visceglia*, 498 F.2d 32 (3rd Cir. 1974). Thus, under the Supreme Court's pronouncements in *Bill Johnson's Restaurants* and controlling law, the NLRB may not enjoin a lawsuit or determine that a litigation position taken in court is an unfair labor practice unless the lawsuit is retaliatory *and* lacks a reasonable basis in fact or law.

Here, Petitioners' motion to compel arbitration is constitutionally-protected activity and cannot be deemed an unfair labor practice. As the District Court acknowledged when it granted the motion to compel arbitration, Petitioners had a reasonable basis in fact and law to file its motion in the underlying lawsuit. Indeed, Petitioners moved to compel arbitration based on the parties' lawful and enforceable Arbitration Agreements. Moreover, the precedential holdings from the Supreme Court's decisions in *Stolt-Nielsen*, 559 U.S. 662, and *AT&T Mobility v. Concepcion*, 563 U.S. 333, not only support the position that Petitioners had a reasonable basis to have filed their motion, but dictate the conclusion that Petitioners acted properly in seeking to arbitrate the employment-related claims brought by Claimants. Accordingly, the litigation position that Petitioners took in their motion cannot constitute a violation of Section 8(a)(1) since it was reasonably based in fact and law and, thus, constitutes constitutionally-protected petitioning of the Government under the First Amendment. Petitioners' actions in the District

Court cannot be a predicate for an unfair labor practice and the Board's findings to the contrary should not be enforced on this ground as well. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1021 (5th Cir. 2015) ("Murphy Oil had at least a colorable argument that the Arbitration Agreement was valid when its defensive motion was made, as its response to the lawsuit was not 'lack[ing] a reasonable basis in fact or law,' and was not filed with an illegal objective under federal law.") (citing *Bill Johnson's Restaurants*).

2. The Limited *Bill Johnson's Restaurants* Preemption Exception Does Not Apply Here

As explained above, based on the Supreme Court decision in *Bill Johnson's Restaurants*, Petitioners' filing of a motion to compel arbitration in federal court cannot be the basis for a finding that an unfair labor practice has been committed. Nonetheless, the Board panel majority purported to rely on a footnote in that case that references how "federal-law preemption" can preclude certain First Amendment protections. *See Bill Johnson's Restaurants*, 461 U.S. at 737, n.5 ("We are not dealing with a suit that is claimed to be *beyond the jurisdiction of the state courts because of federal-law preemption.*") (emphasis added); *see also Webco Indus.*, 337 NLRB 361, 363 (2001) ("[I]f a suit is preempted, it violates Section 8(a)(1) if it tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights."). The majority of the Board panel took that footnote out of context and it has no relevance to the instant action.

In that footnote, the Supreme Court acknowledged that a state court lawsuit, in which the plaintiff [employer] asserts state law claims that are preempted by controlling federal law, is not entitled to First Amendment protection. Consistent with those principles, the Supreme Court and the Board have held that a state court lawsuit that is preempted by the Act enjoys no special protection under *Bill Johnson's Restaurants* and falls outside the scope of the First Amendment protections. See, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (“When it is clear or may fairly be assumed that the activities which a *State* purports to regulate are protected by § 7 of the National Labor Relations Act . . . due regard for the federal enactment requires that state jurisdiction must yield.”) (emphasis added); *J.A. Croson Co.*, 359 NLRB 1 (2012) (holding that bringing of state law claims in state court lawsuit that are preempted by the NLRA violated Section 8(a)(1) of the Act and constituted an unfair labor practice). For example, an employer’s state court lawsuit asserting only a trespass cause of action against union picketers would be preempted by the NLRA because the federal labor law trumps the activities the state seeks to regulate through its tort laws. Such a lawsuit would not be protected under the First Amendment and, therefore, *Bill Johnson's Restaurants* would not apply to provide constitutional protections to those preempted state law claims.

Here, the situation is very different. First and most importantly, the instant action does not involve a situation where Petitioners filed a state court lawsuit asserting state law claims that are obviously preempted by federal law. Petitioners filed their motion in federal district court (in a case initiated by Claimants), relying upon the controlling federal law under the FAA and supporting Supreme Court precedent, in which they properly requested that the federal court enforce the Arbitration Agreements as written and thereby require Claimants to arbitrate their asserted employment-related claims. Because the Board cannot demonstrate that the “FAA’s mandate” of enforcing the parties’ arbitration agreement “according to [its] terms” has been overridden by a “contrary congressional command,” the NLRA cannot be deemed to preempt the FAA and its congressional mandate. *See CompuCredit*, 132 S.Ct. at 669; *see also Gilmer*, 500 U.S. at 26 (stating that there needs to be a congressional “intention to preclude a waiver of judicial remedies for the statutory rights at issue”).

Congress did not intend the NLRA to trump the FAA’s mandate that arbitration agreements be enforced according to their terms. Indeed, the NLRA’s text contains no command that is contrary to enforcing the FAA’s mandate. *See Delock v. Securitas Sec. Svcs. USA, Inc.*, 883 F. Supp. 2d 784, 789-90 (E.D. Ark. 2012). Further, the FAA has not been repealed by either the NLRA or the Norris-

LaGuardia Act⁴⁰ (which the Board cited in *D.R. Horton*). Notably, the FAA has the latest and most recent enactment date of the three statutes. Though Congress first enacted the FAA in 1925, it reenacted the statute in 1947—*after* passing the Norris-LaGuardia Act and reenacting the NLRA. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925); Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932); National Labor Relations Act, ch. 120, 61 Stat. 136 (June 23, 1947); Federal Arbitration Act, ch. 392, 61 Stat. 670 (July 30, 1947). Even with the passage of the Norris-LaGuardia Act and the NLRA after the initial enactment of the FAA and then the re-enactment of the FAA after the enactment of those two other statutes, the applicable terms (Section 2) of the FAA have never varied and always contained the same mandate that controls this situation. As a result, to the extent that there is any “irreconcilable conflict” among those statutes, the FAA must prevail. *See Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n. 18 (1971) (looking to re-enactment of the Railway Labor Act (RLA) to determine that it post-dated the Norris-LaGuardia Act and concluding, “[i]n the event of irreconcilable conflict” between the two statutes, the latter (the RLA) would prevail).

⁴⁰ Under the Norris–LaGuardia Act, a private agreement that seeks to prohibit a “lawful means [of] aiding any person participating or interested in” a lawsuit arising out of a labor dispute is unenforceable, as contrary to the public policy protecting employees’ “concerted activities for . . . mutual aid or protection.” 29 U.S.C. § 101, *et seq.*

Simply put, the NLRA does not preempt the FAA and the conclusion reached by the Board panel majority that Petitioners' motion to compel arbitration is preempted by Section 7 of the NLRA is baseless and wrong. The Supreme Court's pronouncements in *Bill Johnson's Restaurants* apply here to provide constitutional protections to Petitioners in their First Amendment-protected activity of filing their motion in federal court. Thus, the purported violative actions cannot be deemed unfair labor practices and the Board's Order should not be enforced.

F. BAC and CFC are Not Proper Parties to the Proceeding Because It is Undisputed that Neither was "An Employer" of Claimants, as Defined by The Act, and Should Not be Subjected to Any Penalties Here

CFC and BAC never should have been subjected to the Board matters, since they are not proper parties to the action. Thus, even if the Court were to hold that some type of unfair labor practice was committed here, penalties for any such violations should not be imposed on either CFC or BAC.

It is undisputed that neither CFC nor BAC ever was "an employer" of Claimants, as defined by the Act. *See* 29 U.S.C. § 158(a)(1) ("It shall be an unfair labor practice for *an employer* to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.") (emphasis added). Indeed, CFC did not employ either Claimant or any California non-exempt employee.⁴¹

⁴¹ ER 0057, ¶¶ 5-6.

Further, in the underlying lawsuit, Claimants baselessly asserted claims against BAC solely on a successor entity theory of liability and they admit that BAC never employed Claimants.⁴² Because CHL is the only one of the three Companies that ever employed Claimants (or the putative class members), CHL is the only entity that potentially could be a proper party to the proceeding.

Not only did BAC never employ Claimants, but it has no successor liability for any actions of CHL (or CFC). The Supreme Court has made it clear that a successor employer is responsible for (and required to remedy) the unfair labor practices of its predecessor *only if* it was aware of the unfair labor practices at the time of the acquisition. *See Golden State Bottling*, 414 U.S. 168. It cannot be disputed that BAC did not have any knowledge of any alleged unfair labor practices committed by CHL when BAC acquired CHL. The transaction that led to BAC becoming the ultimate parent company of CHL (in July 2008) occurred years before the January 2012 issuance of *D.R. Horton* and the filing of Claimants' charges with the NLRB (later in January 2012), as well as the lawsuit underlying it (filed in June 2009). In addition, a United States District Court already expressly

⁴² ER 0058 ¶, 12(a)-(b), 0183-0216 (Claimants admitting that BAC did not employ them and they were employed only by CHL)) and 0058, ¶ 10, 0163-0182 (as set forth at Paragraph 15 of Exhibit 15, Claimants acknowledged and agreed that, in the underlying lawsuit, they were not pursuing any direct claims against BAC in which they sought liability on behalf of BAC employees)).

ruled that BAC has no successor liability for any actions of CHL or CFC.⁴³ Thus, under *Golden State Bottling*, and its progeny, BAC cannot be held liable for any alleged unfair labor practices purportedly committed by CHL. Accordingly, the unfair labor practice charges cannot be enforced against BAC (or CFC) for this reason as well.

WHEREFORE, Petitioners respectfully pray that this Court review and set aside the NLRB's Order in its entirety and that Petitioners receive any further relief to which they may be entitled.

⁴³ ER 0676, ¶ 6, 0678-0695.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(c), Petitioners identify the following case as a “related” case pending in this Court: Hoot Winc, LLC, et al. v. National Labor Relations Board, Ninth Circuit Case Nos. 15-72839 and 15-72931, which it is believed such case raises the same or closely related issues as to those raised in the instant action.

.Dated: April 14, 2016

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, Rule 32(a)(7)(C), I certify that this Brief complies with the type-volume limitation of Federal Rules of Appellate Procedure, Rule 32(a)(7)(B), because this Brief contains 11,257 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rules of Appellate Procedure, Rule 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure, Rule 32(a)(6) because this Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 14th day of April, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 14th day of April, 2016, I caused this BRIEF FOR
PETITIONERS COUNTRYWIDE FINANCIAL CORPORATION,
COUNTRYWIDE HOME LOANS, INC. AND BANK OF AMERICA
CORPORATION to be filed electronically with the Clerk of the Court using the
CM/ECF System, which will send notice of such filing to the following registered
CM/ECF users properly addressed to the following:

Linda Dreeben, Deputy Associate General Counsel
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Dated this 14th day of April, 2016.

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